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KEBABANGAN PETROLEUM OPERATING COMPANY SDN BHD v. MALAYSIA MARINE AND HEAVY ENGINEERING SDN BHD & ANOTHER APPEAL

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COURT OF APPEAL, PUTRAJAYA
MARIANA YAHYA JCA
AZIMAH OMAR JCA
WAN AHMAD FARID SALLEH JCA
[CIVIL APPEAL NOS: W-02(C)(A)-1836-09-2022
& W-02(C)(A)-1837-09-2022]
14 MAY 2025

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Abstract – *An arbitral award may be set aside if the arbitral tribunal commits a serious breach of the rules of natural justice that has a real impact on the outcome of the arbitral proceedings. Such breaches include: (i) failing to adequately appreciate or explain its reasoning for an awarded sum, especially when it deviates significantly from expert witness' valuations and failing to discuss the basis for each sub-claim when the sub-claims are supported by distinct evidence and computations; (ii) disregarding the opinions of parties' experts and submissions on issues, particularly concerning specific sub-claims; and (iii) failing to address pertinent issues raised by one of the parties, as this constitutes a fundamental procedural unfairness.*

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CONSTRUCTION LAW: *Construction contracts – Arbitral award – Awarded sum deviated significantly from expert witness' valuations – Arbitral tribunal failed to appreciate or explain reasoning for awarded sum – Arbitral tribunal failed to discuss basis for each sub-claim when sub-claims are supported by distinct evidence and computations – Arbitral tribunal failed to address pertinent issues raised by parties – Whether there was breach of natural justice – Whether constituted fundamental procedural unfairness*

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Under the contract between Kebabangan Petroleum Operatic Company Sdn Bhd ('Kebabangan') and Malaysia Marine and Heavy Engineering Sdn Bhd ('MMHE'), MMHE was required to supply valves that were to be procured from Mikuni (M) Sdn Bhd, with OMB Valves S.p.A of Italy, as the manufacturer. Dispute arose when, after the completion of works, Kebabangan discovered that the manual valves were of unknown origin and not OMB valves. The dispute was referred to arbitration. At the end of the arbitral proceedings, the arbitral tribunal concluded that the valves under the contract had to be OMB valves and MMHE had breached the contract by delivering valves that were not OMB. The tribunal awarded Kebabangan, *inter alia*, (i) RM17,241,178.02, as damages for expenses incurred by

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Kebabangan for assessment, procurement and replacement of valves ('claim 1'); (ii) RM9,820,770 as damages suffered by Kebabangan in having to procure 1,365 valves and install 1,454 valves in the future; and (iii) RM1,029,167.25 for Kebabangan's legal fees and expenses ('final award'). At the High Court, Kebabangan applied to enforce the final award while MMHE applied to set aside the same. The High Court dismissed Kebabangan's application and allowed MMHE's application. Hence, the present appeals by Kebabangan against the High Court's decisions in (i) dismissing its application to recognise and enforce the final award as a judgment; and (ii) allowing MMHE's application to set aside the final award.

Held (dismissing appeals)
Per Wan Ahmad Farid Salleh JCA delivering the judgment of the court:

(1) The tribunal did not make any attempt to appreciate any of the arguments with respect to the sum of RM17,241,178.02 being the component of sub-claims. What was more glaring was that there was no explanation from the tribunal as to how it arrived at the claimed amount of RM17,241,178.02 when Kebabangan's expert witness had assessed and valued Kebabangan's claim at RM14,162,655. While the tribunal was not bound to accept the position advanced by either expert, it would only be fair to expect the tribunal to discuss each sub-claim under claim 1. The sub-claims in claim 1 were based on their own respective set of evidence, supporting documents and computation. (paras 16 & 17)

(2) The tribunal was in breach of the rules of natural justice in concluding the award since it had disregarded the opinion of the parties' experts and submissions on the issues in respect of each of the sub-claim in claim 1. The breach of natural justice was significant and had a real impact on the outcome of the arbitral proceedings. (paras 18 & 20)

(3) The tribunal failed to deal with the three issues raised by MMHE. Such failure constituted a serious breach of natural justice in connection with the making of the award and was material to the outcome of the arbitral proceedings. In making the finding, the High Court Judge did not descend from the bench as if Her Ladyship was acting in an appellate capacity. On the contrary, the finding was anchored on the failure of the tribunal to address the pertinent issues raised by MMHE. (para 23)

Case(s) referred to:
CVV & Ors v. CWB [2023] SGCA ***(refd)***
Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC ***(refd)***
Johawaki Development Sdn Bhd v. Majlis Agama Islam Wilayah Persekutuan & Another Case [2020] CLJU 528; [2020] 1 LNS 528 HC ***(refd)***
JY Creative Sdn Bhd v. Meacs Construction Sdn Bhd [2022] CLJU 945; [2022] 1 LNS 945 HC ***(refd)***
Pacific Recreation Pte Ltd v. SY Technology Inc [2008] 2 SLR(R) 491 ***(refd)***
United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 33(3), 34(3), 37(1)(a)(vi), (b)(ii), (2)(b)(ii)
UNCITRAL Arbitration Rules, art. 34(3)

For the appellant - Wilfred Abraham, Kuhendran Thanapalasingam & Agesh Jeyaratnam; M/s Zul Rafique & Partners
For the respondent - Cyrus Das, Mohanadass Kanagasabai, Kalashini Sandrasegaran & Thomas Shaun Mathews; M/s Mohanadass Partnership

[Editor's note: For the High Court judgment, please see Kebabangan Petroleum Operating Company Sdn Bhd v. Malaysia Marine And Heavy Engineering Sdn Bhd & Another Case [2023] CLJU 1772; [2023] 1 LNS 1772 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Wan Ahmad Farid Salleh JCA:

[1] There are two appeals before us which are heard together.

[2] The first appeal is W-02(C)(A)-1836-09/2022 ("Appeal No. 1836") and the second appeal is W-02(C)(A)-1837/02/2022 ("Appeal No. 1837").

[3] Appeal No. 1836 is filed by the appellant, Kebabangan Petroleum Operatic Company Sdn Bhd ("Kebabangan"), against the decision of the Kuala Lumpur High Court dated 30 August 2022 in dismissing the appellant's application to recognise and enforce a final arbitral award dated 23 July 2021 ("final award") as a judgment. Appeal No. 1837 is the appellant's appeal against the decision of the same court in allowing the respondent's application to set aside the final award.

The Factual Background

[4] The brief factual background that leads to these appeals is as follows. By a contract in 2011 for the Fabrication of KBB Topsides, Kebabangan appointed Sime Darby Engineering Sdn Bhd as the contractor. The contract was then novated to the respondent, Malaysia Marine and Heavy Engineering Sdn Bhd ("MMHE").

[5] Under the contract, MMHE was required to supply 2" & below and 3" & above manual ball valves. The valves were to be procured from Mikuni (M) Sdn Bhd with OMB Valves S.p.A, of Italy as the manufacturer. It is not in dispute that works pursuant to the contract were completed in June 2014.

[6] However, disputes arose upon Kebabangan's discovery in April 2016 that the manual valves were, in fact, not OMB valves and were of unknown origin.

[7] The dispute was then referred to arbitration in March 2019. In essence, Kebabangan's case against MMHE was:

(i) MMHE were obliged to procure OMB valves from Mikuni;

(ii) The manual valves supplied by MMHE were not OMB valves and are, in fact, of an unknown origin; and

(iii) As a result of the foregoing, KPOC suffered loss and damage.

[8] At the end of the arbitral proceedings, the Tribunal concluded that (a) the valves under the contract had to be OMB valves and (b) in breach of the contract, MMHE delivered valves that were not OMB valves.

[9] By the final award dated 23 July 2021, the Tribunal awarded Kebabangan:

(i) RM17,241,178.02 as damages for expenses incurred by KPOC for assessment, procurement and replacement of valves in the period 2016 to 2019 ("claim 1");

(ii) interest calculated at 5% p.a. from 11 October 2019 on the sum of RM17,241,178.02;

(iii) RM9,820,770 as damages suffered by KPOC in having to procure 1365 valves and install 1454 valves in the future ("claim 2");

(iv) interest on the sum of RM9,820,770 at the rate of 5% p.a. from 11 October 2019; and

(v) RM1,029,167.25 for KPOC's legal fees and expenses.

[10] On 29 September 2021, Kebabangan applied to enforce the final award. On 30 September 2021, MMHE applied to set aside the final award.

At The High Court

[11] On 30 August 2022, the learned judge dismissed Kebabangan's application and allowed MMHE's application. Hence, the two appeals before us.

[12] In allowing MMHE's application to set aside the final award, the learned High Court Judge found that:

(i) The final award was in breach of natural justice under s. 37 of the Arbitration Act 2005 ("AA") on three counts in that the Tribunal failed to consider or make a finding on MMHE's arguments on:

  (a) quantification of claim 1;

  (b) the issue of waiver, acquiescence and estoppel; and

  (c) whether Kebabangan mitigated its losses.

(ii) The Tribunal failed to make a finding and a reasoned award as envisaged by s. 33(3) of the AA and art. 34(3) of the UNCITRAL Arbitration Rules adopted by the AIAC Rules 2018.

[13] According to the learned judge, the Tribunal was in breach in connection with the making of the final award as the Tribunal (in concluding the final award) had disregarded the opinion of the parties' experts and the submissions made by the parties on the issues in respect of each of the sub-claim under claim 1. The breach, the learned judge found, was a serious one. The learned judge was of the view that had the Tribunal considered and made known its findings on each of the sub-claims, it may well be that the Tribunal would not have awarded the full amount as claimed by Kebabangan.

[14] The High Court further held that the Tribunal was in breach of the rules of natural justice by not addressing the issue of mitigation, which was material to the outcome of the Arbitration.

At The Court Of Appeal

[15] Before us, the learned counsel for Kebabangan submitted as follows:

(i) The final award was set aside because the claim for RM17m was allowed, although experts opined it should be RM14m. The learned judge erroneously held that the Tribunal failed to consider or make a finding in the final award on MMHE's arguments on the quantification of claim 1. Learned counsel contended that the learned judge was mistaken in drawing parallels with *Johawaki Development Sdn Bhd v. Majlis Agama Islam Wilayah Persekutuan & Another Case* [2020] CLJU 528; [2020] 1 LNS 528, where the arbitrator awarded a sum of RM12m when the sum claimed was only RM6m. According to learned counsel, the duty to give reasons is not part of natural justice. In any event, learned counsel contended that the Tribunal had appropriately awarded Kebabangan the sum claimed as per its statement of claim and nothing more.

(ii) The High Court had erred in finding that the Tribunal failed to consider MMHE's arguments on waiver, acquiescence and estoppel. According to the learned counsel for the appellant, the Tribunal had already considered the issue of waiver, acquiescence and estoppel when it considered MMHE's contention that having accepted the valves, it was too late in the day for Kebabangan to allege a breach of contract. This is particularly so since no defects were detected in the valves apart from the claim that they were not from OMB. Learned counsel contended that even if there was an absence of findings by the Tribunal on the question posed by MMHE on waiver, acquiescence and estoppel, natural justice does not require MMHE to be given responses to all submissions. In the

circumstances, learned counsel contended that the learned judge had erred in setting aside the final award on the basis that Kebabangan had waived the shortcomings by accepting the valves and by the issuance of the certificate of completion ("COC"), Kebabangan was estopped from contending otherwise.

(iii) The High Court had also erred in holding that the Tribunal failed to consider or otherwise make a finding in the final award on MMHE's argument on whether Kebabangan mitigated its loss. The learned counsel submitted that the Tribunal had indeed considered and made findings on mitigation in the final award. This is so when the Tribunal made it clear that "future purchase and installation of the remaining valves are reasonable on the facts of the case".

(d) The learned counsel for Kebabangan contended that the High Court had erroneously held that the arbitral procedure was not in accordance with s. 34(3) of the AA and art. 34(3) of the UNCITRAL Arbitration Rules adopted by the AIAC Rules 2018 in failing to make a reasoned award for claim 1. Relying on *JY Creative Sdn Bhd v. Meacs Construction Sdn Bhd* [2022] CLJU 945; [2022] 1 LNS 945 and *CVV & Ors v. CWB* [2023] SGCA, the learned counsel reiterated the propositions that the duty to give reasons is not part of natural justice and failure to provide reasons is merely an error in law.

[16] As to the first ground, we take note that the Tribunal did not make any attempt to appreciate any of the arguments with respect to the sum of RM17,241,178.02 being the component of sub-claims. What was more glaring was there was no explanation from the Tribunal as to how did it arrive at the claimed amount of RM17,241,178.02 when Kebabangan's expert witness had assessed and valued Kebabangan's claim at RM14,162,655.

[17] While we agree that the Tribunal is not bound to accept the position advanced by either expert, as pointed out by the learned judge, it would only be fair to expect the Tribunal to discuss each sub-claim under claim 1. The sub-claims in claim 1 are based on their own respective set of evidence, supporting documents and computation.

[18] In the circumstances of the case, we respectfully agree with the learned judge that the Tribunal was in breach of the rules of natural justice in connection in concluding of the award since it had disregarded the opinion of the parties' experts and the submissions made by the parties on the issues in respect of each of the sub-claim in claim 1. As stated by the Singapore Court of Appeal in *Pacific Recreation Pte Ltd v. SY Technology Inc* [2008] 2 SLR(R) 491 CA, a breach of natural justice occurs if, in the course of reaching its decision, the Tribunal disregarded the submissions and

arguments made by the parties on the issues without considering the merits thereof. As correctly pointed out by the learned judge, had the Tribunal considered and made known its findings on each of the sub-claims, it may well be that the Tribunal would not have awarded the full amount as claimed by Kebabangan.

[19] In the context of the instant appeal, the material disputations between the expert witnesses with respect to each sub-claim in claim 1 were not mere arguments or even submissions that need not be individually responded to as contended by the learned counsel for Kebabangan. On the contrary, these are material elements and specifically pleaded defences relied on by MMHE, which the Tribunal had failed to determine that would have affected the award in claim 1.

[20] The breach of natural justice is, therefore, significant and has the real impact on the outcome of the arbitral proceedings.

[21] As to the Tribunal's failure to consider MMHE's arguments on waiver, acquiescence and estoppel, the learned counsel for Kebabangan contended that since the Tribunal found that the valves were discovered to be not being from OMB was only in April 2016, Kebabangan would not have waived, acquiesced or should be estopped from something it was not aware of.

[22] There were three questions posed by MMHE at the Tribunal. The three questions are as follows:

(i) whether the issuance of COC amounts to a representation by Kebabangan that they are satisfied with the completion of the works and are now estopped from contending otherwise, including in placing reliance on cl 2.6 part 2 of the contract;

(ii) whether Kebabangan had waived shortcomings, if any, in terms of the performance of the works by way of accepting the valves and the issuance of COC, save in respect of any continuing obligations; and

(iii) whether Kebabangan had accepted any shortcomings and/or deviations from the KBB contract during the course of the contract by, *inter alia*, making payment and accepting the valves? whether Kebabangan should be estopped from asserting otherwise.

[23] Unfortunately, the Tribunal failed to deal with these three issues raised by MMHE. We therefore respectfully agree with the learned judge that such a failure constitutes a serious breach of natural justice in connection with the making of the award and is material to the outcome of the arbitral proceedings. In making the finding, the learned judge did not descend from the bench as if she was acting in an appellate capacity. On the contrary, the finding was anchored on the failure of the Tribunal to address the pertinent issues raised by MMHE.

[24] While we recognise that natural justice does not require MMHE to be given responses to all submissions made before the Tribunal, the failure of the Tribunal to specifically address the three issues raised by MMHE is of significance that could have impacted the outcome of the arbitral proceedings.

[25] As to whether Kebabangan had mitigated its loss, we take cognisance that the issue was clearly pleaded and submitted by the parties. MMHE, in para. 68 of its statement of defence, averred that Kebabangan had failed to take any mitigation measures to reduce or minimise any losses it allegedly incurred. On the other hand, Kebabangan, in para. 49 of its statement of reply, pleaded that it had satisfied its duty to mitigate, which included prioritising the replacement of valves based on the safety and criticality of the valves.

[26] Unfortunately, despite the specific pleadings on the issue of mitigation made by the parties, it was not addressed by the Tribunal. We respectfully agree with the learned judge that such a failure amounts to a breach of the rules of natural justice. Our reason is this. Had the Tribunal addressed MMHE's contention on mitigation, it could have resulted in a reduction of the quantum of the award.

[27] Finally, Kebabangan took issue against the finding of the learned judge that the arbitral procedure was not in accordance with the agreement of the parties. The agreed arbitral procedure is as follows:

(i) Article 34(3) of the UNCITRAL Arbitration Rules as part of the AIAC Arbitration Rules 2018. The article provides that the arbitral tribunal shall state the reasons upon which the award is based upon unless the parties have agreed that no reasons are to be given.

(ii) Likewise, s. 33(3) of the AA provides that an award shall state the reasons upon which it is based unless (a) the parties have agreed that no reasons are to be given or (b) the award is an award on agreed terms under s. 32.

[28] Learned counsel for Kebabangan argued that the duty to give reasons is not part of natural justice and that a failure to provide reasons is merely an error of law. The *ratio* in CVV, the Singapore case relied on by the learned counsel for Kebabangan, is that the inadequate provision of reasons and explanations is, at the very most, a mere error of law. In short, an allegation of the same, on its own, is incapable of sustaining a challenge against the entirety of an award.

[29] In our view, the failure of the Tribunal is more than mere failing to provide adequate reasons and explanations. It is beyond that. As alluded to earlier, the final award, even taken at its highest, does not inform the parties of the basis in which the Tribunal arrived at its decision with respect to the quantification of claim 1. At the risk of being repetitive, the award does not explain how did the Tribunal reach the sum of RM17,241,178.02, being the component sub-claims and whether Kebabangan has proven its loss for the purpose of assessment and quantification of the same amount. This is even more so considering Kebabangan's expert itself stood on record in assessing Kebabangan's claim at a much lower amount in the sum of RM14,162,655.

[30] Make no mistake. It is trite that a tribunal, just like a court, is not bound to accept expert evidence. However, if an expert opinion is accepted or rejected, a tribunal must give a cogent reason for doing so; see *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182 SC. In the instant appeal, the arbitral Tribunal did not assign any reason, let alone a cogent one, in awarding a sum much higher than the assessment made by Kebabangan's own expert witness.

[31] In our considered view, such a departure, without assigning any reasons thereto, is more than a mere error of law. It goes beyond that. It comes within the ambit of art. 34(3) of the UNCITRAL Arbitration Rules and s. 33(3) of the AA. A challenge on the award can, therefore, be sustained.

Conclusion

[32] The Federal Court in *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1; [2019] 2 MLJ 413 made it clear that s. 37(2)(b)(ii) of the AA specifically categorises a breach of the rules of natural justice which occurred in connection with the making of an arbitral award as being in conflict with the public policy of Malaysia. If established, as in the instant appeal, it can be a ground to set aside an arbitral award.

[33] We therefore agree with the findings of the learned judge that:

(i) The award is in conflict with the public policy of Malaysia in that a breach of the rules of natural justice had occurred in connection with the making of the award pursuant to s. 37(1)(b)(ii) and 37(2)(b)(ii) of the AA when the Tribunal failed to consider and make a finding on MMHE's arguments:

(a) on the quantification of the damages on claim 1;

(b) the issues of waiver, acquiescence and estoppel; and

(c) whether KPOC had mitigated its loss.

(ii) The arbitral procedure was not in accordance with the agreement of the parties pursuant to s. 37(1)(a)(vi) AA, as the Tribunal failed to make a reasoned award in respect of claim 1.

[34] For the foregoing reasons, we find no appealable error on the part of the learned judge in setting aside the arbitral award in Appeal No. 1837 and the dismissal of Kebabangan's enforcement application in Appeal No. 1836.

[35] Both of the appeals are, therefore, dismissed with costs as follows:

(i) Appeal No. 1837 : RM50,000

(ii) Appeal No. 1836 : RM15,000

subject to allocatur.